APPENDIX "A".

United States Court of Appeals
for the Eighth Circuit.

No. 17,363.

Floyd Rairdon Hayes,
Appellant,

v.

United States of America,
Appellee.

No. 17,364.

Cecil H. Bennett,
Appellant,

v.

United States of America,
Appellee.

No. 17,365.

Stanley Burke Clevenger,
Appellant,

v.

United States of America,
Appellee.

Appeals from the United States District Court for the Western District of Missouri.

[March 30, 1964.]

Before Van Oosterhout, Matthes and Mehaffy, Circuit Judges.

Van Oosterhout, Circuit Judge.

Defendants Floyd Rairdon Hayes, Cecil H. Bennett and Stanley Burke Clevenger, hereinafter sometimes jointly

referred to as appellants, have taken timely appeals from their convictions and sentences upon the counts of a sixteen count indictment upon which each stands convicted. Count I of the indictment, which is the count most vigorously attacked, charges the three appellants and four co-defendants, Karl Rogers, Robert Williams, Roy Williams and Earl Dean Williams, with conspiracy under 18 U. S. C. A., § 371, to violate 29 U. S. C. A., § 501 (c). Section 501 (c) effective September 14, 1959, provides:

> "(c) Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be (punished). . . ."

It is alleged and undisputed that the seven defendants charged in the indictment are all officers or employees of Local 41 and/or Local 541 and/or Joint Council 56, all affiliated with the Brotherhood of Teamsters.

Count I charges that the seven defendants between September 14, 1959, and February 20, 1962, conspired to unlawfully abstract money and assets from the union locals just described, of which they are officers or employees. In substance, three categories of fraudulent transactions are asserted to wit: (1) Invoice padding and kickback arrangements with two business establishments, Harold's D-X Service Station and La Louisiane Restaurant; (2) fraudulent automobile repairs on nonauthorized vehicles at three garages; and (3) fraudulent home improvements and furnishings for Hayes.

Numerous overt acts in furtherance of the conspiracy are alleged.

Counts II through XVI charge substantive offenses arising out of the same type of wrongful conduct involved

in the conspiracy charge and are directed against some or all of the defendants heretofore named. All counts charge the defendants named in such counts as officers or members of labor organizations willfully and intentionally embezzled assets of such labor organizations and converted them to their own use or the use of others directly or indirectly in violation of 29 U. S. C. A., § 501 (c). We are here concerned primarily with the charges against the three appellants. Hayes is charged in Counts II, III, V, VI, VIII, IX, X,[1] XI, XIII, XIV, XV and XVI. Bennett is charged in Counts II, V, VIII, XI, XII, XIV, XV and XVI. Clevenger is charged in Counts VIII and XI.

Counts II, III and IV charge a pad and kickback arrangement with La Louisiane Restaurant. Counts V, VI and VII charge a similar arrangement with Harold's D-X. Counts VIII through XIII charge fraudulent arrangements with automobile establishments to have unauthorized personal automobile repairs charged to and paid for by the unions. Counts XIV, XV and XVI involve improvements and furnishings for Hayes' home fraudulently charged to and paid for by Local 41.

Defendant Robert Williams entered a plea of guilty to all counts on which he was charged and was an important witness for the Government at the trial. The remaining six defendants were tried to a jury. The court sustained Earl Williams' motion for acquittal upon the ground the evidence was insufficient to sustain the charges against him. Defendants Karl Rogers and Roy Williams were acquitted by the jury upon all counts.

Hayes was found guilty upon all counts upon which he was charged. He was sentenced to five years imprisonment on counts I and II to be served concurrently and fined $500 upon each of the remaining ten counts upon

[1] Count X was dismissed by the court.

which he was convicted, with imposition of imprisonment upon such counts suspended.

Bennett was found guilty on Counts I and VIII and not guilty of the other charges against him. He was sentenced to two years imprisonment on Count I; imposition of imprisonment on Count VIII was suspended but defendant was placed on probation for a two year period beginning at the expiration of the Count I sentence.

Clevenger was found guilty on Counts I, VIII, and XI, which were the only counts with which he was charged. He was sentenced to two years imprisonment on Count I. Imposition of sentence on Counts VIII and XI was suspended, defendant being placed on probation for two years commencing with the expiration of the Count I sentence.

Appellants here urge that they are entitled to a reversal for the following reasons:

I. The court erred in overruling Bennett and Clevenger's motion for acquittal on Count I upon the ground that there is a fatal variance between the indictment charging a single conspiracy and the proof showing at best a number of separate conspiracies.

II. The court erred in its instructions permitting conviction if the conspiracies were separate and distinct and in failing to delineate and define such separate conspiracies and gave the jury a roving commission to return convictions upon undefined conspiracies.

III. The court by its instruction on the substantive counts relating to automobile repairs improperly placed the burden of proof upon the defendants.

IV. The court erred in refusing to permit appellants to call and examine Special Assistant Attorney General Featherstone as a witness.

V. The court erred in failing to strike Robert Williams' testimony by reason of the Government's failure to comply with 18 U. S. C. A. § 3500.

Appellant Bennett joins in the points just stated and asserts additional grounds for reversal as follows:

VI. The court erred in overruling Bennett's motion for acquittal on Count VIII as the Government has failed to produce substantial evidence to support conviction upon such count.

VII. The court erred in ordering Bennett's counsel to refrain from commenting in closing arguments upon the failure of certain codefendants to testify thereby depriving Bennett of a fair trial.

We shall consider the errors asserted in the order in which they have just been stated.

I.

Bennett and Clevenger in their timely motions for acquittal, which were renewed after verdict, urged that there was a fatal variance in Count I in that said count charges a single overall conspiracy, whereas the proof at best shows only many separate and distinct conspiracies involving the seven defendants and some fifteen non-indicted conspirators and that under the teaching of **Kotteakos v. United States**, 328 U. S. 750, they have been prejudiced by such variance and hence the court erred in overruling their motions. The Government has consistently maintained that it has charged a single overall conspiracy and that it has proved such conspiracy.

Recently in **Isaacs v. United States**, 8 Cir., 301 F. 2d 706, we were confronted with the contention that the conspiracy to defraud the traction company was multiple rather than single. There, as here, the defendants did not receive

their payoff out of the same transactions. The various fraudulent schemes employed differed considerably and involved different primary participants, both insiders and outsiders. In **Isaacs** by reason of the instruction given to acquit if a single overall conspiracy had not been proved, it was apparent the jury found the single conspiracy. We affirmed the conviction. At pages 724 to 726 of 301 F. 2d we pointed out that the multiple conspiracy defense is not a novel one and we set out the principles to be applied in determining whether a single overall conspiracy is established, citing supporting authorities. No purpose will be served in restating such principles which are thoroughly discussed in **Isaacs**. We adhere to what we have there said.

Appellants stress their contention that the conspiracy here was of the circle type rather than of the chain type. We perceive no useful purpose in attempting to name the type of conspiracy here involved. Conspiracies to deal in contraband goods such as narcotics have sometimes been described as chain conspiracies. In such situations where all dealing with the narcotics know the transaction to be an illegal one, it is somewhat easier to infer an intention to participate in an overall illegal activity. For a discussion of the chain conspiracy situation, see **United States v. Agueci**, 2 Cir., 310 F. 2d 817, 827.

Isaacs did not involve dealing with a contraband product. Nevertheless, we found the evidence sufficient to support the finding of a general overall conspiracy in a situation where different groups performed different functions in carrying out the overall scheme to defraud the traction company.

The fundamental problem in each conspiracy case is to establish the nature and the scope of the conspiracy agreement and the connection of the defendants with the

conspiracy. In **Sigers v. United States**, 5 Cir., 321 F. 2d 843, Judge Wisdom characterizes the conspiracy there under consideration as follows:

> "In a sense, there were three conspiratorial wheels, each with its hub and spokes. But these were wheels within a wheel. The larger wheel was the conspiracy charged in Count One of the indictment." 321 F. 2d 843, 844.

In support of such statement, he quotes from **United States v. Wenzel**, 4 Cir., 311 F. 2d 164, 167, as follows:

> "It is fundamental that it is not necessary that every act undertaken in carrying out the object of a conspiracy should be participated in by every member of the conspiring group. In carrying out the purpose of a conspiracy it will be found that in practically every case different groups played different parts. To unite them in a single conspiracy it is only necessary that the activities of each individual or group be directed toward accomplishing a single criminal objective." 321 F. 2d 843, 847.

In **United States v. Speed**, D. D. C., 78 F. Supp. 366, Judge Holtzoff considered a conspiracy to embezzle from a number of unions by means of various devices. The case bears much similarity to the case we are here considering. In support of his conclusion that the jury was justified in finding a general overall conspiracy, Judge Holtzoff states:

> "The answer to the question whether there is a single conspiracy, therefore, depends on whether there is a single agreement. There may be an undertaking to commit one crime or several crimes. If there is but one agreement, there is but one conspiracy. A test whether the activities of the defendants constitute a single conspiracy is whether there is a common

purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this ends. It follows hence that the fact that the conspirators undertook to commit several crimes does not necessitate the conclusion that there are several conspiracies. A conspiracy, such as is charged in this case, may be likened to a wheel, with the hub constituting the central figure, the spokes forming its various branches and ramifications, and all being held together by the rim, which represents the agreement." 78 F. Supp. 366, 368-69.

The opinion contains a good summary of the law with respect to proof of a conspiracy and the connection of the defendants with such conspiracy.

The issue of whether a conspiracy is a single overall conspiracy is usually one of fact. **United States v. Crosby**, 2 Cir., 294 F. 2d 928, 945.

Judge Gibson, the able trial judge who heard all the evidence in ruling upon the post-trial motion for acquittal, discusses and considers **Kotteakos** and finds it to be factually distinguishable. With respect to the present case, the court states:

"They all knew each other, if not intimately, then on a day-to-day working basis. The three labor organizations were closely connected, both through extensive cooperation, and through common or interlocking officers and trusteeships. The evidence showed that the schemes to divert the union funds in all three organizations were similar, and most involved the same business establishments. Thus, the case at bar does not present the situation of the 'Wheel with spokes radiating from the hub, without the interconnecting rim,' as in the **Kotteakos** case, but a spoked

wheel with the connecting rim, if the analogy used in the **Kotteakos** case is used. Thus the Court is of the opinion that it was a permissible inference that there was a single conspiracy, which is a question of fact for the jury."

When the tests stated in **Isaacs** are applied to the facts in this case, we are convinced that the court correctly determined that a submissible case was made out for the jury on the issue of the single overall conspiracy. Such determination affords a firm basis for the denial of the motion for acquittal.

The record before us consists of over 2000 pages of testimony, a lengthy record of court proceedings and many exhibits. A detailed discussion of the voluminous evidence would unduly extend this opinion. Our examination of the record abundantly satisfies us that there is substantial evidence to support a jury finding of an overall conspiracy to embezzle a very substantial amount of union funds from the three locals by devious means and that there is likewise adequate evidence to support a finding that each of the appellants knowingly joined such conspiracy and participated in furthering its objectives. Thus it is apparent that the court committed no error in overruling the motions for judgment of acquittal.

II.

Bennett and Clevenger assert prejudicial error in the court's instruction reading:

> ". . . If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment of Count I and that not all of the defendants were members of or participated in such separate conspiracies, if you so find, then you may only consider as evidence against the members of such

conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy."

Appellants have failed to comply with our rule requiring that the exception to the instruction be set out in the brief. Appellants had requested an instruction to the effect that if the jury found more than one conspiracy they must acquit the defendants. The court refused such instruction. When the court asked for suggestions as to the instruction now attacked, Mr. Wadden, counsel for Roy Williams, stated: "For the purpose of the record, defendant Roy Williams can offer no suggestions because he feels the prejudice to him is so great that no instruction of the court can eliminate it from the case." Counsel for appellants took a similar position. In an earlier discussion relating to the instructions, Mr. Wadden did make some suggestion that the court delineate and define the conspiracies and the conspirators involved in the separate conspiracies. No specific exception was made to this instruction at the time opportunity was afforded so to do after the instructions were read to the jury. The defendants did, however, advise the court that they were preserving all exceptions previously made to the proposed instructions. While we consider it doubtful whether the exception now urged is properly preserved, we have chosen to consider it. The trial court in its post-trial memorandum explains the reason for the challenged instruction, stating:

> "Even if separate conspiracies were proven, the variance of proof from the single conspiracy count in the indictment cannot be said to have been prejudicial to the convicted defendants. The jury was instructed many times, when evidence bearing on the conspiracy count was introduced, that such evidence could be used against any particular defendant only after the jury had found that particular defendant's connection with the conspiracy alleged from other independent

evidence. Also, the jury was instructed that if it should find several distinct conspiracies then it could 'only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy.' Of course, assuming several separate conspiracies were proved the possible prejudice that might result is based on the danger that the jury will associate a particular defendant with evidence introduced to prove what was in fact a separate conspiracy with which that defendant had no connection. Under the circumstances of this case and because of the cautionary instructions given, it is difficult to conceive how this could have been prejudicial to any of the convicted defendants. Again, assuming separate conspiracies, all were so interrelated and connected with each other so that all could logically be viewed as part and parcel of the broad conspiracy charged of mulcting the unions of their funds."

The instructions as a whole meticulously defined all the elements of conspiracy and instructed the jury that the guilt of each defendant must be individually determined and that if any of the essential elements of conspiracy are not proved beyond a reasonable doubt as to a particular defendant, he should be acquitted. The court went over his proposed instructions in great detail with counsel prior to the final argument and incorporated in the instructions many of defendants' suggestions. The instructions as a whole are very fair to the appellants and the only exceptions taken to the instructions are those discussed in this opinion. Appellants in their brief with respect to the challenged instruction state:

"[W]hile it does an admirable job of keeping the acts and declaration of co-conspirators straight as between the undefined conspiracies, it sets up a situation where the jury is led to believe it can find either a single

conspiracy or separate conspiracies as long as it slots each defendant in the proper separate conspiracy."

The court's failure to give an instruction for acquittal if separate conspiracies are found is not separately asserted as an error in a brief point. However, the general tenor of appellants' brief is that under **Kotteakos** it was prejudicial error to permit a conviction if the conspiracy is not a single overall one. While we have hereinabove held that substantial evidence exists to support a single overall conspiracy and the knowing connection of each appellant therewith, there is no way of determining precisely upon this record whether or not the jury in fact found a single conspiracy. In a similar situation the Court of Appeals for the Second Circuit in **United States v. Agueci**, 310 F. 2d 817, 827, states:

> "In any event, the test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). The material inquiry is not the existence but the prejudicial effect of the variance. While we believe, as we have already stated, that the jury could find there was but one conspiracy, the finding of more than one conspiracy would not result in prejudice to any of the defendants in the case before us. See **Berger v. United States**, 295 U. S. 78, 82, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). The requirements for sustaining a verdict in which there has been a variance have been met. The several conspiracies, if there had been such, could have been joined in a single indictment or consolidated for a single trial and the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal."

In our view, any conspiracy found to exist in the present case with respect to appellants would fall within the

framework of the conspiracy charged in the indictment. Under such circumstances, it is established that proof of separate conspiracies does not constitute a fatal variance. **Berger v. United States**, 295 U. S. 78. In **Berger** a single conspiracy was charged and two conspiracies were found to exist. The court, rejecting the fatal variance contention, stated:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." 295 U. S. 78, 82.

In our present case, the two tests stated in **Berger** are fully met.

Kotteakos does not dispute the holding of **Berger** as applied to the facts in **Berger**. In **Kotteakos** the court points out that while a single conspiracy was charged, the Government admitted upon appeal that there were at least eight separate and distinct conspiracies. Thirty-two defendants were indicted. The only connection between the different groups of conspirators was that the individual fraudulent loan transactions were all carried out through the same person, Brown. No group derived any benefit from the activity of any other group. Outside of Brown, none of the defendants had any common interest in the success of any other defendant and no relationship was established between the various defendants exclusive of Brown. The court stresses at length the likelihood of prejudice to the separate defendants involved in the sepa-

rate conspiracies by the mass trial and the danger of transfer of guilt, stating:

> "Here toleration went too far. We do not think that either Congress, when it enacted § 269, or this Court, when deciding the **Berger** case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. Leeway there must be for such cases as the **Berger** situation and for others where proof may not accord with exact specifications in indictments. Otherwise, criminal conspirators never could be brought to halt. But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Section 269 had no purpose to go so far. The line must be drawn somewhere. Whether or not **Berger** marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one." 328 U. S. 750, 773-74.

The following cases, among others, have held that even if the proof could be interpreted as showing multiple conspiracies, there was no prejudicial error or fatal variance from the indictment charging one conspiracy. **Berger v. United States**, supra; **Grissette v. United States**, 5 Cir., 313 F. 2d 187, 188; **United States v. Agueci**, 2 Cir., 310 F. 2d 817, 827; **Harlow v. United States**, 5 Cir., 301 F. 2d 361, 369; **United States v. Santore**, 2 Cir., 290 F. 2d 51, 68-69;

Hanis v. United States, 8 Cir., 246 F. 2d 781, 789; **Jolley v. United States**, 5 Cir., 232 F. 2d 83, 88; **Ritter v. United States**, 10 Cir., 230 F. 2d 324, 328-29; **Owens v. United States**, 5 Cir., 221 F. 2d 351, 356; **United States v. Speed**, D. D. C., 78 F. Supp. 366, 368.

If separate conspiracies are in fact here involved, this case comes much closer to **Berger** than **Kotteakos**. The evidence clearly points to Hayes as the creator, the key figure and substantial beneficiary of all the fraudulent schemes. No prejudice is claimed or shown with respect to Hayes. Bennett as secretary-treasurer signed many of the checks on union funds. Evidence shows he had an important part in arranging for the fraudulent car repairs including some upon his own automobile. Additionally on one occasion he was given an open envelope by Harold's D-X containing charge slips and currency for delivery to Robert Williams. Because of a pending investigation, Williams refused to accept the envelope and at Williams' suggestion Bennett returned the envelope to the donor.

Clevenger's direct activity was in connection with the car repair fraud. There is evidence that in a number of instances he brought in cars which were not entitled to repairs at union expense and that he directed such charges to be made on his official car and thus have the bills paid by the union. A similar practice was followed at the garages by Hayes and Bennett and there is evidence that Clevenger had knowledge of such activities.

Here, unlike the situation in some of the cases relied upon by the appellants, the defendants charged were a closely knit group acquainted with each other. The offices of each of the unions were located in the same building. Some of the defendants were officers or employees of more than one of the locals involved.

The fact that the defendants Rogers and Roy Williams were acquitted supports the view that the jury was not confused by the court's instructions and that it determined the guilt of each defendant upon the basis of the evidence admissible against such defendant. See **United States v. Rabin**, 7 Cir., 316 F. 2d 564, 568.

The trial of multiple defendants frequently raises trial problems. Appellants have not demonstrated any prejudicial error flowing from their joint trial. In our view, the danger of confusion of of finding guilt by association in this case is far less than that existing in many other cases involving mass trials which we have affirmed. See **Butler v. United States**, 8 Cir., 317 F. 2d 249, 263; **Isaacs v. United States**, supra.

Defendants in order to be entitled to relief for prejudicial error in a mass trial must show prejudice with respect to themselves. This they have failed to do.

III.

Defendants' contention that the court's instruction with reference to the substantive counts relating to automobile repairs is prejudicially erroneous in that the instruction shifts the burden of proof upon appellants is without merit. The portion of the instruction excepted to and here challenged reads:

> "To explain it another way, if you believe that the repair was made on a car that a defendant was using in union business and that said repair was necessitated by the use of the car in union business, then you must bring back a verdict of acquittal as to said defendant on the substantive count in which he is involved on these charges, even though said defendant may have had a rental car or a car allowance on a car other than the one actually repaired."

Appellants concede that the court in the paragraph immediately preceding correctly states the law and places the burden upon the Government upon the repair counts. The apparent purpose of the challenged instruction is to direct the jury to consider appellants' contention that the disputed repairs were authorized.

The instructions as a whole clearly place the burden of proof upon the Government to establish all elements of the offense. When the challenged instruction is read in the light of the instructions as a whole, it is apparent that the jury could not have been misled by the instruction.

IV.

The trial court did not abuse its discretion in refusing to permit appellants to call Mr. Featherstone, Government counsel who was participating in the trial, as a witness. The trial court has a broad discretion with respect to examination of witnesses. Complications arise where attorneys actively participating in the trial are produced as witnesses. We recently considered this problem and set forth the applicable law and pertinent authorities in **Gajewski v. United States**, 8 Cir., 321 F. 2d 261, 268:

> "Although, as the above authorities indicate, such judicial discretion is generally exercised to prevent testimony by an advocate in **favor** of the party whom he represents, a court may, without abusing its discretion, refuse to allow the **defense** to call as a witness the United States Attorney trying the case."

In our present case, appellants did not notify the Government of their desire to use Mr. Featherstone as a witness until well along in the trial of the case.

A brief statement of the facts relating to the calling of Mr. Featherstone as a witness appears to be desirable. While testifying as a Government witness, defendant Rob-

ert Williams admitted having conversations with Mr. Featherstone with respect to the facts of this case. On cross-examination the following questions and answers appear during the examination of Mr. Williams by defendants' counsel:

"Q. Recommendations. He (Mr. Featherstone) would recommend to the judge you get leniency? Right?

A. I couldn't say what he meant to recommend. All I can say is that he used the word recommendations.

Q. What did you take this to mean?

A. I took it to mean he would tell the court that I had fully cooperated and told the story as it was, and that was it.

Q. And you expected lenieney from the court, isn't that it?

A. I couldn't tell what I expected. My expectations—I can't—"

Defendants' counsel then stated they desired to call Mr. Featherstone to establish what conversation took place between him and Mr. Williams and what promises were made and what recommendations were to be made to the court. When this first arose, the trial court suggested that Mr. Featherstone file an affidavit covering the conversation. Such affidavit was never filed. On the following day the demand for Mr. Featherstone's testimony was renewed. At that time, Mr. Featherstone stated out of the presence of the jury:

"As to the recommendations, that question has been answered. As to the other part of the conversation it would have to be concerning his personal safety, the tie-up between the local Mafia and the Teamsters and various other matters. That's the only things we discussed, his personal safety and how we would prevent the Teamsters from killing him. Now, if he wants that—"

Nothing was then said about the failure of Mr. Featherstone to file the affidavit nor was this matter pursued at any time during the trial. The Government's position is that the statement served the purpose of the suggested affidavit. The court stated:

> "I don't think at this time that Mr. Featherstone should be called on the witness stand unless it is by agreement of all of defense counsel. Now, he has stated that his testimony probably would be prejudicial to many of the defendants. Now, if they want to invite that, that's one thing. I don't want any situation with mistrial called or the grounds for mistrial."

The following colloquy appears:

> "Mr. Featherstone: And further, Your Honor, if any questions were asked of me, I am sure the answer would have to be prejudicial to these defendants and then they would be screaming for a mistrial.
>
> The Court: Well, I think they would have invited that if they put you on the stand.
>
> Mr. Broaddus [counsel for Appellant Clevenger]: Not this counsel, Your Honor."

It would appear that if Mr. Featherstone were called as a witness and pressed to give the full conversation he had with Williams, the testimony would include Williams' expression of personal danger from the defendants. Such testimony could well be highly prejudicial. Since Clevenger's counsel indicated that he would not assume the risk, we believe the court exercised its discretion properly in refusing to permit defendants to call Mr. Featherstone as a witness.

While Williams' testimony with respect to the nature of the recommendations he expected is not as specific as

might be desired, it would convey to the jury the thought that he was expecting some special consideration and there is little reason to believe in the light of Mr. Featherstone's record statement that anything Mr. Featherstone could say would be of any help to the defendant. On the contrary, serious danger existed that Mr. Featherstone, if called, might be pressed to disclose the entire conversation which included the discussion about protection.

V.

The trial court did not commit error in refusing to strike the testimony of Robert Williams under 18 U.S.C.A. § 3500 because of the Government's failure to produce FBI notes of the interview with Williams. Defendants were given the "smooth report" prepared from notes taken by the FBI agents which report was approved and signed by Williams. Such report falls within (e) (1) of § 3500. Appellants urge that they are entitled to the notes taken by the FBI agents which notes were used as an aid in preparing the smooth reports. Such claim is made under § 3500 (e) (2), which reads:

> "(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The trial court states the issue as follows:

> "The question then clearly becomes, were the handwritten notes of the interviews with Robert Williams

'statements' within the purview of § 3500, and if they were, was the government entitled, in good faith, to destroy such notes and produce only the 'smooth reports' prepared from such notes?"

It is established that FBI agents had five interviews with Williams; that no shorthand notes or electronic or mechanical recording was made of such interviews; that incomplete longhand notes were taken which were not verbatim; that smooth reports were drawn from such notes and the agents' memory; that Williams did not approve the original draft entirely; that indicated changes were made, and the smooth report was then approved and signed by Williams; that the agents in accordance with their usual practice destroyed the rough notes. The trial court found that the notes made were not of a type within the contemplation of (e) (2) and hence the Government was not required to produce such notes, which notes had previously been destroyed in good faith. Such were permissible findings of fact supported by substantial evidence.

The question of whether a statement or transaction falls within § 3500 is ordinarily a question of fact to be determined by the trial court and governed by the clearly erroneous standard. **Campbell v. United States**, 373 U. S. 487, 493; **Palermo v. United States**, 360 U. S. 343, 354-56. Appellants have failed to demonstrate that the court's foregoing findings are clearly erroneous.

Moreover, if contrary to what we have just stated, the trial court was wrong in its determination, appellants have failed to show the error to be prejudicial. The prejudicial error rules applies to § 3500. **Rosenberg v. United States**, 360 U. S. 367, 371. In our present case, defendants were furnished with the smooth report signed and approved by the witness. There is nothing in the record to indicate any likelihood that the notes would vary substan-

tially from the statement furnished. If this is not so, it would seem extremely unlikely that the notes meet the requirements of (e) (2) inasmuch as the report furnished had been approved by the witness.

VI.

Bennett challenges the sufficiency of the evidence to support his conviction on Count VIII charging fraudulent automobile repairs. Bennett was at all times subsequent to October 1959 furnished with a rented car for business purposes. Union officials were entitled to repairs, depreciation, insurance and gas on personal cars used for business purposes. There is some evidence that officials furnished rented cars still could use private cars for business and thereby be entitled to repairs at union expense. There is also evidence that generally the right to repairs and depreciation terminated when a rented car was furnished.

We agree with Bennett's contention that the burden is upon the Government to show wrongful appropriation of union funds as well as fraud. The trial court adequately answers Bennett's contention, stating:

> "Defendant Bennett concedes that there was sufficient evidence to raise an inference that the requisite intent was present on this charge, but claims that the government did not make a prima facie case that the car repaired in this count was not used in union business. It seems clear to the Court that, viewing the evidence in a light most favorable to the prosecution, enough evidence was produced to raise an inference sufficient to go to the jury that the car in question was not being used in union business. The very nature of charging the repairs to another car would suggest that the transaction was fraudulent

in this respect. When this is coupled to the fact that defendant Bennett had been furnished with a rented car for use in union business, the inference becomes stronger. It is true that the defendant did adduce testimony which tended to show that he continued to use his own personal car on union business, but this was a question of fact, which it was the primary duty of the jury to decide as to whether defendant Bennett was entitled to have his personal car repaired at union expense. The jury having obviously decided that he did not, in fact, have such a right, it does not devolve upon this Court to overturn that decision of fact."

The question of whether Bennett's use of his personal car was such under union policy as to authorize repairs chargeable to the union raises a fact issue. The jury by its verdict found against Bennett upon such issue.

VII.

Finally Bennett urges the court committed prejudicial error as to him in ordering his counsel not to comment in his argument to the jury upon the failure of co-defendants to testify. This error is predicated upon the majority opinion in **De Luna v. United States**, 5 Cir., 308 F. 2d 140, rehearing denied 324 F. 2d 375. The Government attempts to brush off this contention as frivolous, giving it only brief footnote treatment. We consider the issue raised to be substantial and troublesome.

De Luna involved a narcotics charge against De Luna and Gomez. Gomez took the stand and testified that while traveling in a car De Luna tossed a package to him and told him to throw it out of the window. Gomez further testified that he had no knowledge of the contents of the package. De Luna, as was his right, elected not to testify. In argument to the jury, counsel for Gomez emphasized

that Gomez had taken the stand and told the truth but that De Luna had not testified and had consequently not denied Gomez's version of what had happened. Gomez was acquitted. De Luna was convicted. Upon appeal, all judges agreed that prejudicial error had been committed against De Luna by permitting the reference to his failure to testify. Cases supporting such conclusion are adequately set out in the **De Luna** opinion.

Gomez, because of his acquittal, had no occasion to appeal. At the trial his counsel was permitted to comment at length upon De Luna's right to testify. The correctness of such ruling from Gomez's standpoint is not squarely raised upon the appeal but such issue necessarily enters into the discussion because of the conflicting rights of the two defendants. The majority opinion holds that Gomez's counsel had a right to comment upon De Luna's failure to testify even though the effect of such right was to create prejudicial error against De Luna. Judge Bell, concurring specially, sets out the reasons why he believes counsel for Gomez had no right to comment.

Our case is significantly distinguishable factually from **De Luna**. We do not believe that Bennett upon the basis of the record in this case has shown that any prejudice has resulted to him from the denial of the right to comment. The charges against five defendants were submitted to the jury. Bennett, Roy Williams and Rogers took the witness stand. Defendants Hayes and Clevenger did not testify. Bennett's testimony is to the effect that he committed no wrongful acts. We do not here have a situation where Bennett or any of the testifying defendants pinned any criminal acts upon non-testifying defendants. Here, unlike the situation in **De Luna**, Bennett did not place the sole blame for the wrongful acts charged upon a co-defendant. Bennett made no charges against Hayes or Clevenger with respect to any issue material to his defense.

Under such circumstances, it is difficult to perceive any benefit that might flow to Bennett by permitting him to call the attention of the jury to the fact that some of his codefendants did not testify.

A trial judge has a large responsibility in assuring a fair trial to all parties. The burden of this responsibility is greatly increased in a mass trial where conflicting rights of defendants may arise. Permitting comment upon the failure of a defendant to testify constitutes prejudicial error as to the non-testifying defendant. On the other hand, where defendant is tried separately his counsel has the right to make fair comment upon the fact that his testimony has not been denied or contradicted. The jury is entitled to consider lack of evidence as well as evidence in reaching its determination.

The problem here presented requires the weighing of the rights of the testifying and the non-testifying defendants and the preservation of the constitutional right to a fair trial guaranteed to each defendant. Upon the peculiar facts of this case, our finding of no prejudice requires an affirmance upon this issue. We limit our decision strictly to the precise facts of this particular case.

We have given careful consideration to all errors asserted by the appellants. We hold that the appellants have had a fair trial and that the court committed no prejudicial error. Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 17,364.

September Term, 1963.

Cecil H. Bennett,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Cecil H. Bennett, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

March 30, 1964.

Order entered in accordance with Opinion:

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX "B".

In the
United States District Court for the
Western District of Missouri,
Western Division.

United States of America,
Plaintiff,
vs.
No. 24,252.
Roy Lee Williams et al.,
Defendants.

Order Denying Motions of Defendants Stanley Burke Clevenger and Cecil H. Bennett for Judgment of Acquittal or in the Alternative for a New Trial, and Motion of Floyd Rairdon Hayes for New Trial.

(Filed May 1, 1963, J. C. Truman, Clerk.)

(p. 1)

This is a criminal action, in which an Indictment was returned in some Sixteen Counts against defendants. Count One charged all defendants with conspiracy to violate §501 (c), Title 29, U. S. C., in violation of §371, Title 18, U. S. C. All defendants were employees or former employees of one or the other of the following labor organizations: Over the Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union Number 41, Kansas City, Missouri, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 41"); Building Material, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union Number 451, Kansas City, Missouri, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 541"); Joint Council Number 56 of Missouri and Kansas of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (hereinafter referred to as "Joint Council 56").

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Before describing the substantive counts of the Indictment, certain definitions may prove useful. "Pad" as used herein means the addition of fraudulent or nonexistent charges on the monthly statements or bills of said labor organizations by the establishment named in the count, or by the owner or operator of said establishments. "Kickback" means the payment of the sums fraudulently collected from the labor organizations as a result of the "pad" to the union official named, or the payment to such person of a portion of such "pad." Of course, the result of such transactions as defined would be an embezzlement or misappropriation of the funds of the local union.

Counts Two, Three, and Four charged a pad and kickback arrangement with La Louisiane Restaurant, with Local 41, Joint Council 56, and Local 541, being the respective victims.

Counts Five, Six, and Seven charged similar arrangements regarding the accounts of Local 41, Joint Council 56, and Local 541 with Harold's D-X Service Station respectively.

Counts Eight through Thirteen, inclusive, involved a somewhat different arrangement, whereby it was alleged that the defendants had arranged to have their own personal automobiles repaired at the automobile establishment named in each count, with the repairs being charged to and paid for by the labor organization named in said

count. Counts Eight and Nine charged that this arrangement existed between Hoffman Buick Company and Local 41 and Joint Council 56 respectively. Counts Ten and Eleven charged this type arrangement with Greenlease O'Neill with the victims being Joint Council 56 and Local 41, respectively. Counts Twelve and Thirteen charged a similar practice with Paul Greenlease, Inc., the victims being Local 41 and Joint Council 56, respectively.

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Count Fourteen involved certain furniture which was alleged to have been used in defendant Hayes' home, and which was charged to Local 41 by Gallup Office Furniture and Appliance Co.

Counts Fifteen and Sixteen involved certain work which was allegedly performed at the homes of certain of the defendants by Mojac Missouri Company and Max Okun, and which was caused to be charged to the account of Local 41.

All defendants were charged in Count One, the conspiracy count. Defendant Karl L. Rogers was charged also in Counts Three, Four, Six, Seven, Ten, and Thirteen. Defendant Roy Lee Williams was also charged in Counts Two, Three, Five, Six, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, and Sixteen. Defendant Robert LeRoy Williams was charged in Counts Two, Three, Four, Five, Six, Seven, Eleven, and Thirteen. Defendant Earl Dean Williams was also charged in Counts Ten and Fifteen. Defendant Stanley Burk Clevenger was also charged in Counts Eight and Eleven. Defendant Cecil H. Bennett was also charged in Counts Two, Five, Eight, Eleven, Twelve, Fourteen, Fifteen and Sixteen. Defendant Floyd Fairdon Hayes was charged also in Counts Two, Three, Five, Six, Eight, Nine, Ten, Eleven, Thirteen, Fourteen, Fifteen, and Sixteen.

Defendant Robert LeRoy Williams pleaded guilty to all counts in which he was charged. All other defendants pleaded not guilty to all charges. Trial to a jury was had. At the close of the government's case, the Court sustained a motion to dismiss Count Ten, on the ground that the acts alleged therein had occurred before the passage of 501 (c), Title 29, U. S. C. The Court also sustained defendant Earl Dean Williams' motion for acquittal on the ground that the government had failed to introduce sufficient evidence to sustain the burden of proof against him, as a matter of law.

(p. 4)

The jury then returned with its verdict acquitting defendants Karl L. Rogers and Roy Lee Williams on all counts in which they were charged. Defendants Stanley Burk Clevenger and Floyd Rairdon Hayes were convicted on all counts in which they were charged, and defendant Cecil H. Bennett was convicted on Counts One and Eight, and acquitted on all others in which he was charged.

Defendant Cecil H. Bennett and defendant Stanley Burk Clevenger now move for a judgment of acquittal pursuant to Rule 29, Fed. R. Crim. P., or in the alternative, for a new trial, pursuant to Rule 33, Fed. R. Crim. P. Defendant Floyd Rairdon Hayes moves for a new trial, pursuant to Rule 33, Fed. R. Crim. P.

The first ground alleged in the motions is that there was a fatal variance from the Indictment in that while the Indictment alleged a single conspiracy, several separate conspiracies were proved. Defendants rely principally on the case of **Kotteakos v. United States**, 328 U. S. 750, in this regard. At the outset it should be stated that defendant Hayes could have in no way been prejudiced by this alleged variance, since even if there were separate conspiracies, it was clear from the evidence that he was the

central and controlling influence in each. To put it in the language used by the Supreme Court in the **Kotteakos** case, if the conspiracies were indeed separate, as to him they were not separate, as he was the "hub" of the wheel. If these conspiracies can be likened to a wheel.

In regard to defendants Bennett and Cleyenger, the Court is of the opinion that this case is distinguishable from the **Kotteakos** case. One important distinction is immediately obvious. The government does not concede here, as it did in the **Kotteakos** case, that there is a variance between the proof and the Indictment as if relates to

(p. 5)

the conspiracy charge. Indeed, in the case at bar, the government has consistently and vigorously maintained that a single conspiracy was charged and proved. The government relies principally on the cases of **Berger v. United States**, 295 U. S. 78, and **Blumenthal v. United States**, 332 U. S. 539, in regard to the multiple conspiracy problem.

There are basically two problems involved here. First, was there actually more than one conspiracy proved, and second, if so, were the defendants prejudiced by the joinder of the several conspiracies into one count? In determining the question of whether there was a single or multiple conspiracies involved, it must be noted that this is a question of fact and necessarily, of degree of knowledge, of the purpose and extent of the conspiracy and of the identities of the other persons involved. There can be little disagreement that the object of the conspiracy charged in this case was the conversion or diversion of the funds of the local unions. The government contends that the various methods in which this object was carried out were simply means of achieving this general object. The contention of the defense is that these methods were several separate conspiracies, each with the same object,

as was held in the **Kotteakos** decision. In the **Kotteakos** case the facts showed that one of the defendants, who pleaded guilty, was the hub of several fraudulent schemes, and each of the other defendants entered into the alleged conspiracy without knowledge of the existence or the identity of the other conspirators, with the exception of the "hub." It was this circumstance which rendered the proof fatally variant from the Indictment in that case. In the case at bar, the situation, though similar, is distinguishable from that in the **Kotteakos** case. Here the convicted defendants were all officers or employees of the

(p. 6)

three labor organizations involved. They all knew each other, if not intimately, then on a day-to-day working basis. The three labor organizations were closely connected, both through extensive co-operation, and through common or interlocking officers and trusteeships. The evidence showed that the schemes to divert the union funds in all three organizations were similar, and most involved the same business establishments. Thus, the case at bar does not present the situation of the "Wheel with spokes radiating from the hub, without the interconnecting rim," as in the **Kotteakos** case, but a spoked wheel with the connecting rim, if the analogy used in the **Kotteakos** case is used. Thus the Court is of the opinion that it was a permissible inference that there was a single conspiracy, which is a question of fact for the jury.

Even if separate conspiracies were proven, the variance of proof from the single conspiracy count in the indictment cannot be said to have been prejudicial to the convicted defendants. The jury was instructed many times, when evidence bearing on the conspiracy count was introduced, that such evidence could be used against any particular defendant only after the jury had found that particular defendant's connection with the conspiracy alleged from

other independent evidence. Also, the jury was instructed that if it should find several distinct conspiracies then it could "only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy." Of course, assuming several separate conspiracies were proved the possible prejudice that might result is based on the danger that the jury will associate a particular defendant with evidence introduced to prove what was in fact a sep-

(p. 7)

arate conspiracy with which that defendant had no connection. Under the circumstances of this case and because of the cautionary instructions given, it is difficult to conceive how this could have been prejudicial to any of the convicted defendants. Again, assuming separate conspiracies, all were so interrelated and connected with each other so that all could logically be viewed as part and parcel of the broad conspiracy charged of milking the unions of their funds.

The second ground asserted by defendants Clevenger, Hayes, and Bennett in support of their respective motions is that the Court erred in refusing to allow defendants to call James Featherstone, counsel for the government, to testify in regard to the possible bias, prejudice, and self-interest of the chief government witness, Robert Williams. Robert Williams, who was indicted with defendants, had pleaded guilty and testified at the trial on behalf of the government. His testimony was very damaging as to certain of the defendants. He admitted upon cross-examination that during the investigatory and later stages of the case he had a conversation with Mr. Featherstone, at which time Mr. Featherstone represented to him that he could make no promises of leniency, that the extent of punishment was up to the Court, but that if Robert

Williams co-operated with the government, Mr. Featherstone would make recommendations to the Court, but that the Court was not bound to follow any such recommendations. Robert Williams did not testify as to the nature of the recommendations which might be made. Defendants assigned as reason for calling James Featherstone their desire to bring out, in his testimony, the nature of the recommendations which he told Robert Williams he would make. The American Bar Association Canons of Professional Ethics, Canon 19 provides:

(p. 8)

> "When a lawyer is a witness for his client, except as to merely formal matters such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

Neither of the cases cited by the parties herein, either **Fisher v. United States**, 231 F. 2d 90, or **United States v. Alu**, 246 F. 2d 29, is particularly in point, but each does deal with this general problem. The **Fisher** case does seem to indicate that whether to call an attorney for one of the parties is discretionary with the Court. This, of course, means the **sound** discretion of the Court. There can be no dispute that such a request is very unusual and irregular and that it should not be allowed unless, under all the circumstances, it appears necessary to secure the rights of the defendants. In the case at bar the witness Robert Williams admitted that the government, while making no promises, had stated that they would make certain recommendations to the Court, the nature of which were unknown, but the inference was clear that the recommendations would be favorable to the interest of Robert Williams. Consequently, Robert Williams admittedly was

testifying somewhat in his own self-interest, but this does not mean that he was necessarily testifying falsely. Under the circumstances, it might have been of some interest to learn the testimony of counsel Featherstone, although his testimony presumably would have been to a large extent, cumulative to that of Robert Williams. However, the Court is of the opinion that its discretion was exercised properly in refusing to allow defendants to call counsel Featherstone as a witness. Featherstone had participated to a substantial extent in the trial, which had lasted several days to that point. The intent of the defendants was not made known to Featherstone until the day before counsel for defendants announced their in-

(p. 9)

tention to call him. Perhaps had Featherstone known of this intention sufficiently ahead of time, he could have refrained from participating in the conduct of the trial. Although the rights of the accused must be protected, the government does also have some rights during the trial of a criminal cause. In the opinion of the Court the necessity of acquiring the testimony of counsel Featherstone regarding the possible bias of the witness Robert Williams did not require the highly irregular circumstance of calling upon the counsel for the government to testify especially since the witness Robert Williams had admitted that he had a certain self-interest in his testimony, and the testimony of Featherstone would have only gone to the degree of that interest. Further, it is not possible that defendants Clevenger and Bennett could have been prejudiced by this refusal, as the testimony of Robert Williams did not tend to implicate them, but instead tended to exculpate them from the charges as to which said Robert Williams testified. Therefore, it cannot be said that they had any interest in the impeachment of the testimony of Robert Williams.

It, of course, was known by the Court that no assurances of any kind were made to witness Robert Williams or to anyone in his behalf by the Court. It was likewise known to the Court that certain assurances of protection were afforded the witness Robert Williams by the government that would in all probability have been testified to by the counsel Feathersfone if called as a witness. Such assurances and the reasons therefor would have been most damaging to all defendants; would have been most prejudicial to all defendants; and would have substantially affected the consideration of the proper issues in the trial by the jury, and finally would have made it most difficult

(p. 10)

for the jury to consider the issues of culpability and guilt of defendants in an objective manner, after receiving such highly prejudicial, yet relevant evidence relating to the witness Robert Williams' requested need for protection. Any other assurances were covered by the witness Robert Williams in his cross-examination. The Court thus is of the opinion that defendants were not prejudiced by being unable to question government counsel Featherstone on this issue but rather were relieved of possible highly prejudicial but admittedly relevant testimony relating to the issue of witness Robert Williams' interest or bias in testifying.

The third ground asserted by all convicted defendants in support of their respective motions is that the Court erred in refusing to strike the entire testimony of Robert Williams on the ground that the original notes of the interviews of Robert Williams with the agents of the Federal Bureau of Investigation were destroyed and therefore § 3500, Title 18, U. S. C., required that the testimony be struck. There is no complaint by defendants that all the reports in existence covered by § 3500 were not pro-

duced, but the crux of the allegations of defendants is that the original notes were subject to production under § 3500, and that these notes were deliberately destroyed by the F. B. I. agents, and that, therefore, the testimony to which they applied should have been struck. The smooth typewritten reports produced were prepared by the agents from the original handwritten notes, and these smooth reports were examined by the person who had been interviewed, and signed by him as being an accurate report of the interview. The question then clearly becomes, were the handwritten notes of the interviews with Robert Williams "statements" within the purview of § 3500, and if they were, was the government entitled, in good faith, to destroy such notes, and produce only the

(p. 11)

"smooth reports" prepared from such notes? This latter problem was left open in the case of **Campbell v. United States**, 361 U. S. 85 (1961), by the Supreme Court of the United States. The closest case to the case at bar appears to be a district court case, **United States v. Aviles**, 197 F. Supp. 536 (D. C. S. D. N. Y. 1961). In that case the narcotics agent had taken incomplete notes contemporaneously with his interview with the witness, from which the agent subsequently prepared a typewritten report, which the witness examined. This was the same procedure followed by the government in the instant case in regard to the witness Robert Williams. In the **Aviles** case the additional question was raised that the notes were destroyed in bad faith by the government to prevent their production to defendants. The Court in that case found that the testimony of the government agent that he destroyed the notes in bad faith was unworthy of belief, and went on to decide that such original handwritten notes were not "statements" within the meaning of § 3500, and the testimony of the witness should not be stricken for

the failure of the government to produce said notes. This Court agrees with the reasoning of the District Court for the Southern District of New York in its reasoning in the **Aviles** case that notes admittedly not a strictly verbatim transcript of the statement of the witness, from which a smooth report is later made, the smooth report being an expansion of the original notes, the expansion being made possible by association of memory of the agent with the cursory notes and abbreviations contained in the original notes of the interview, are not subject to being produced under § 3500. The Court is of the opinion that to hold otherwise would extend § 3500, the so-called "Jencks Act," far beyond the intentions of Congress in passing it, and would impose an intolerable burden upon

(p. 12)

the federal investigatory agencies in retaining all notes and memorandums, in whatever form or stage of completeness, for examination by defendants. This is not to say that in a proper case, it might not be necessary to produce such notes, but in this particular case, said notes are not subject to production, especially where the witness has examined the completed report and approved it as accurate.

All defendants convicted allege, in support of their respective motions, that this Court erred in the following portion of the charge to the jury, in that it was inconsistent and confusing with other instructions, and granted the jury a roving commission to return convictions on various undefined conspiracies, although only one conspiracy was charged:

> ". . . If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment in Count 1 and that not all of the defendants were members of or participated in such

separate conspiracies, if you so find, then you may only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy."

It is difficult to see how defendants were prejudiced by this instruction. The Court had previously defined all the elements of a conspiracy and instructed the jury that if any one of these elements were not present as to any particular defendant, then he could not be convicted of the conspiracy. Thus armed with a knowledge of the nature and elements of a conspiracy the jury cannot be said to be ignorant of the effect of the evidence as applied to the conspiracy count. The question of a single or multiple conspiracies, as stated previously, is primarily a question of fact. The jury, knowing the elements of a conspiracy, is capable of determining whether there were one or several conspiracies. The instruction complained

(p. 13)

of, was merely a cautionary one in which the jury was warned as to what evidence it might use in determining the fact issues reserved for its determination, and in which the jury was cautioned not to allow the evidence admitted against one defendant to be used against another, to whom it did not apply. This was exactly the prejudice which resulted in fatal error in **Kotteakos v. United States** (supra), and in the opinion of the Court, the above instruction served to eliminate such prejudice in this case, if any did indeed exist, and could not have been considered prejudicial to defendants. Again, regarding defendant Hayes, as he was clearly implicated in all phases of the conspiracies or conspiracy, it was a single conspiracy as to him, and he could have in no way been prejudiced. As to the other convicted defendants, Clevenger and Bennett, their conviction on the substantive counts is indicative of their participation in the conspiracy.

As their fifth assignment of error in support of their respective motions, all defendants claim that the Court erred in giving the following instructions to the jury, in regard to the Counts involving automobile repairs:

> "... if you believe that the repair was made on a car that a defendant was using in union business, and that said repair was necessitated by the use of the car in union business, then you must bring back a verdict of acquittal as to said defendant on the substantive count in which he is involved on these charges, even though said defendant may have had a rental car or a car allowance on a car other than the one actually repaired."

The contention of the defendants is that this charge improperly shifted the burden of proving that the repairs were necessitated by use of the car in union business to defendants. Taken out of context as this portion of the charge is, it may appear that the burden of proof was shifted, but when the whole of the charge relating to these

counts is considered, it is clear that no such shifting occurred and that it was made clear to the jury where the burden of proof lay, and that this portion of the charge merely stated defendants' theory as to the use of cars conversely from the manner in which it had been just previously stated, and that considering the whole of the charge, it was clear that the burden of proof was not shifted.

Defendant Bennett, in support of his motion, alleges, as a sixth assignment of error on the part of this Court, the failure of this Court to allow counsel for defendant Bennett to comment on the failure of defendants Hayes and Clevenger to testify on their own behalf. At a conference in chambers preceding final argument in this

case, counsel for defendant Bennett expressed his intention to comment upon the failure of defendants Hayes and Clevenger to testify and to draw inferences therefrom favorable to his client and unfavorable to defendants Clevenger and Hayes, and stated that he relied upon the case of **DeLuna v. United States**, 308 F. 2d 140 (5th Cir. 1962). The Court specifically then ordered counsel for defendant Bennett to refrain from commenting on Hayes' and Clevenger's failure to testify. The Court was aware of the decision in the **DeLuna** case prior to ruling upon this matter, and both views are set forth in the majority and dissenting opinions in that case very ably, and this Court will not proceed to discuss this problem in detail here. Suffice it to say that this Court does not consider itself bound to follow the majority opinion in the **DeLuna** case; that it does not consider the majority opinion in that case to be a correct statement of the law as it is or as it should be, and that the Court does agree with the dissenting opinion in the **DeLuna** case, which, it is believed, correctly states the law. To hold otherwise gives defendants similarly situated the right to demand as a matter of law, a mandatory severance.

(p. 15)

Defendant Bennett also asserts, as a seventh ground in support of his motion, that the evidence of the government in regard to Count Eight of the Indictment, failed to establish a prima facie case. Defendant Bennett concedes that there was sufficient evidence to raise an inference that the requisite intent was present on this charge, but claims that the government did not make a prima facie case that the car repaired in this count was not used in union business. It seems clear to the Court that, viewing the evidence in a light most favorable to the prosecution, enough evidence was produced to raise an inference sufficient to go to the jury that the car in question was not being used in union

business. The very nature of charging the repairs to another car would suggest that the transaction was fraudulent in this respect. When this is coupled to the fact that defendant Bennett had been furnished with a rented car for use in union business, the inference becomes stronger. It is true that the defendant did adduce testimony which tended to show that he continued to use his own personal car on union business, but this was a question of fact, which it was the primary duty of the jury to decide as to whether defendant Bennett was entitled to have his personal car repaired at union expense. The jury having obviously decided that he did not, in fact, have such a right, it does not devolve upon this Court to overturn that decision of fact.

For the reasons above stated the motions of defendants Bennett and Clevenger for a judgment of acquittal or, in the alternative, for a new trial, and the motion of defendant Hayes for a new trial, respectively, are denied.

It Is So Ordered.

Floyd R. Gibson,
Judge.

Kansas City, Missouri,
May 1, 1963.

APPENDIX "C".

Text of the Jencks Act, 18 U. S. C., § 3500:

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pur-

suant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

§ 501. Fiduciary responsibility of officers of labor organizations—Duties of officers; exculpatory provisions and resolutions void.

(c) Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.